Intellectual Property, Competition and Human Rights

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Intellectual Property, Competition and Human Rights: the past, the present and the future

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We were delighted that Professor Paul Geroski, then Chairman of the UK Competition Commission, was able to join us for our expert working group meeting in December 2004. Paul's contribution to our proceedings was excellent. He was engaged and informed and made valuable contributions to our debate - provoking and stimulating input from the participants. It was the first time that many of us had met Paul. With his warm and engaging personality we had firm hopes that Paul would become a regular member of our group. Sadly that was not to be. As will be known to many readers, Paul died in the summer of 2005. We dedicate this collection of papers, to which he contributed, to his memory.

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The "Intellectual Property, Competition and Human Rights" research stream at the AHRC Research Centre for Studies in Intellectual Property and Technology Law (the Centre) was set up in response to growing concern as to the present scope, and even existence of intellectual property (IP). There has been increasing recourse, in case law, commentary and activism, to human rights and competition to remould, resituate, or replace, IP. The purpose of this research is to consider the extent to which these fields could be combined, at both academic and practical levels, to produce flexible, sustainable, national and international solutions.

Initial research identified that while there was significant work ongoing as to the proper role of IP and its association with competition and human rights; the place in economics and competition of human rights and social policy; and an opening of debate as to the relevance of human rights in the commercial sphere, there was no substantial work on the interrelationship of the three fields. Further, the moving of IP to centre stage in national politics, leading to free trade agreements reinforcing and expanding the parameters of the rights, together with the possible need for an international enforcement mechanism, brought the World Trade Organisation into the equation.

1. December 2004 Event

With the kind support of the British Academy, the Centre convened a meeting of experts in Edinburgh in December 2004: "Towards Utopia or Irreconcilable Tensions? The interface between intellectual property, competition and human rights." Participants were from academia and international institutions, from the developed and developing world, and with international expertise in one or more of IP, competition, human rights and world trade. Papers were presented, followed by roundtable discussion and questions from an audience comprising academics, practitioners, publishers and students. Case studies were then considered, as, although it had been chosen to approach the matter from an academic legal perspective, the underlying objective was to develop practical solutions.

We consider this event to have been a great success, enabling stimulating exchange of ideas and, more importantly, opening, or even revealing, doors between different fields. An edited note of the event, together with presentations and the case studies considered, is available at

http://www.law.ed.ac.uk/ahrb/research/publications.asp?ref=3.

2. Papers

Building on the discussions, participants prepared the papers which we are delighted to present here. By way of overview, we are interested, and excited, to note that, notwithstanding the variety of different starting points, there are synergies in approach and identification of the same key events and sources. These include Schumpeterian theories of innovation, the *Magill* case, the South African challenge in accessing medicines, the existence of exceptions to most human rights (at least in the legal context) and the recognition that IP, competition and human rights are not, and need not be, wholly dissimilar. Most encouraging, continuing the mood of the meeting, there is an openness and willing to engage with other fields and move forward together.

MacQueen provides an insightful overview of the relationships between IP and competition, and IP and human rights. In addition, he takes us back, reminding of what may, or should, be the fundamental principles guiding a legal system, and the place of IP. Thus, while he opens with "Intellectual Property is, on any view, in crisis", by reference to human rights instruments, and to cases considering the relevance to IP of competition and human rights, (*Magill*, *IMS*, *Microsoft*, *Ashdown*, *Campbell*, *Levi* and *Coflexi*p), he reveals that possible cures exist, and could be further pursued, by reference to these fields. This leads to his conclusion that "very often all three of these legal concepts will march hand-in-hand. But human rights without doubt have a higher value than IPRs (and indeed competition law rules), and in the perhaps rare cases of conflict it is a trump card. But human rights are themselves often in conflict and only occasionally absolute, so the trumping effect is by no means guaranteed."

MacCormick considers the potential impact of the now uncertain EU Constitution, incorporating the (otherwise non binding) EU Charter on Fundamental Freedoms. As a member of the drafting team for the Constitution, he provides a rare insight into the often slow progress of such instruments, and of the historical and instrumental roots of the Charter. He also stresses that, in its present form, the wide recognition of rights binds only EU institutions, and only when carrying out their existing powers. He then focuses on the right to property, subject to various limits (including regulation in the general interest), and the tantalising subparagraph that "Intellectual Property shall also be protected." MacCormick notes that this provides no detail as to what type of IP is covered, what the impact of this would be on revocation of IP, and also that it is not stated whether this is subject to the restrictions previously set out in respect of the right to property. In this regard, it is noteworthy that MacQueen considers that the subparagraph is subject to the more general limitations on rights elsewhere in the Charter. MacCormick, while welcoming the clarity of the Charter, notes the potential for diverging lines of jurisprudence in respect of different European human rights instruments. Interestingly in the present context, (although note Nwauche's argument regarding the place of IP as a human right) MacCormick considers that in the case of conflict, the European Court of Human Rights jurisprudence should prevail. This leads to interesting speculation as to the extent to which the starting point and perspective of the court is likely to lead to a different emphasis from that of the ECJ and national IP courts.

Nwauche introduces the distinction between "intellectual property rights", and the human "right to intellectual property" and argues that, from the starting point of intellectual property as a human right, intellectual property can be seen as both relevant to competition policy, and to trade. He further argues that intellectual property can properly be seen as protecting and rewarding both private and public interests, consistent with its status as a human right pursuant to two parts of article 15 (1) International Covenant on Economic, Social and Cultural Rights. Building on this, he argues that suggestions that human rights should "trump" IP are misguided, seeing it more as a complex interrelationship. He argues that the balances carried out in *Ashdown*, the South African Constitutional Court in *Laugh It Off!* and *Campbell* support his thesis. Nwauche goes on to argue that there may be basis for incorporating human rights concerns into public policy grounds for striking down contracts. In the competition field, he argues that human rights should form part of the assessment of abuse of a dominant position, and be a valid non market reason for framing competition policy, particularly in developing countries.

From the more general competition policy perspective, Geroski considers the potential conflicts and, more significantly, the synergies, between IP and competition, in terms of their objectives of encouraging innovation. He queries, however, whether IP is necessarily the best means of doing this, particularly given IP's present lack of reference to levels of investment to bring about the invention, to the extent of monopoly gain which may be recovered from the consumer, and to the relationship between prospects of recovery of costs and the incentive to create. Geroski also expresses concern at the risk of patent thickets, and IP's restrictions on access to the knowledge pool on the part of further innovators. That said, he then notes the additional alternative costs which would be entailed in a broader more flexible form of regulation of innovation, possibly through procurement and subsidy, or greater use of competition policy.

In terms of theories of innovation, after an overview of the Schumpeterian approach, Geroski introduces the distinction between disruptive and sustaining innovation, and comments that a monopoly position will not encourage the former, more fundamental, progress. Geroski notes that IP rewards after innovation, rather than creating an environment (as can competition policy) which leads to innovation in the first place. As a result, not only will an attack on an existing monopoly not prevent further innovation, but IP and competition are not inimical, and can operate together and in parallel towards the same goals. Geroski also notes, however, that this should not prevent restrictive acts in respect of IP being subject to competition review.

Against this backdrop, Korah provides an illuminating overview, from the legal perspective, of IP's role in competition. Korah proceeds on the basis that the market, rather than government or regulation, is the best means of encouraging innovation – and goes on to note that the exclusive rights conferred by IP can be a barrier to market entry. Korah considers the differing types of innovation, and the twin challenges of encouraging significant new innovation (which may require the grant of broad rights); and maintaining competition in existing fields (which broad rights may prevent). To this, Korah adds the continuing uncertainty as to the role of competition: to protect competitors, as was initially the position of the EC Commission; or to protect consumers while also encouraging investment in innovation, which latter approach has been developed more recently by the EC Commission. Korah then considers different approaches adopted in the US and EC to the essential facilities doctrine, and potentially inconsistent legal and economic approaches of the EC Commission and European Court of Justice in *Volvo*, *Magill*, *IMS,Microsoft* and *Syfait*. She concludes that there is no present certainty as to the circumstances in which there may be an obligation to supply, much less when there may be an obligation to supply material the subject to IP in the innovation, network or heavily regulated or standardised industries of present interest.

3. Future action

Two final points. Firstly, while the meeting and papers recognise the relevance of other fields, there was also acceptance of the dangers of experts in one field engaging in another, without wider awareness of that field and its fundamental principles. This could lead to the very benefits which can be gained by considering IP from the perspective of market operation, or wider human rights values, being lost or misunderstood.

Secondly, when the meeting considered case studies, notwithstanding the momentum which had been gained, all participants found it hard to, as it were, abandon their roots. Broadly, IP lawyers focussed on whether there was in fact infringing conduct; competition lawyers on market definition; and human rights lawyers on both the desirable outcome from the perspective of human rights values, and the challenges in achieving this through human rights fora and legislation. The bridges which seemed to have been built in theory, disappeared when there was an actual problem to solve.

The Centre has therefore launched a research network. This involves existing project participants, together with members from the new fields of corporate law, regulatory theory and international relations, and new members with expertise in our existing areas of focus who can contribute a broader geographical perspective. Workshops are planned for 2006, with a view to further developing, testing with a wider audience, and seeking to implement creative, practical interdisciplinary proposals.

We must thank all the authors and participants for their outstanding contributions and Nadine Eriksson-Smith for her eternal support. We welcome comments on the papers and would also be delighted to hear from anyone interested in becoming involved in the project. Further details are at

http://www.law.ed.ac.uk/ahrb/research/view.asp?ref=3.

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